(3)

No. 01-38

Supreme Court, U.S.
FILED
DEC 14 200
CLERK

In The

Supreme Court of the United States

STATE OF CALIFORNIA, acting by and through the California State Water Resources Control Board,

Petitioner,

v.

UNITED STATES OF AMERICA, U.S. Department of Army, Corps of Engineers,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

BILL LOCKYER
Attorney General of the State of California

RICHARD M. FRANK
Chief Assistant Attorney General

MARY E. HACKENBRACHT
Senior Assistant Attorney General

JOHN A. DAVIDSON
Supervising Deputy Attorney General

MICHAEL W. NEVILLE
Deputy Attorney General
Counsel of Record

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5523
Fax: (415) 703-5480

Counsel for Petitioner State of California

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6PP

REPLY BRIEF FOR PETITIONER

In its Brief in Opposition, the United States effectively concedes that this case presents important questions of federalism; the United States does not contradict California's argument that this dispute is but the latest chapter in the recurring controversy between the States and the United States regarding the compliance of federal polluters with state environmental requirements. *See* Petition for Writ of Certiorari, 6-8. Instead, the United States argues that this Court should not grant California's petition because the Ninth Circuit's particular determinations in the challenged decision are too narrowly "fact bound" to be worthy of this Court's review. Opposition at 8. But the United States proceeds from a fundamental misconception.

The Ninth Circuit's decision is not fact bound; it is devoid of facts. The courts below simply had no critical facts before them. The district court ruled on the United States' motion to dismiss and had no evidentiary record before it upon which it could make any factual determinations concerning the relationship of the fees to the volume of the United States' dredging[1] activities

---

[1] The United States repeatedly has characterized California's fees for waste discharge requirements as "dredging fees." In fact, California law provides that such fees may be assessed for a wide variety of other activities resulting in discharges such as storm water runoff from an equipment yard or parking lot, the operation of treatment facilities, solid waste disposal, or the discharge of contaminated soil associated with a site cleanup. Cal. Water Code § 13260 reproduced at App. 33-37; *see also* Petition at 5-6. It is only because the work of the Corps frequently involves dredging that the Corps tends to associate waste discharge requirements fees with that activity.

and the water quality impacts resulting from those activities.[2]

The Ninth Circuit's approach conflicts with the cogent precedent of the Second and First Circuits construing the phrase "reasonable service charges" in sovereign immunity cases involving payments of fees, an important and recurring question of federal law. Petition at 19-28. Indeed, the Ninth Circuit's factually unsupported determination that the Corps received no services or benefits directly contradicts the cases of *Jorling v. United States Department of Energy*, 218 F.3d 96 (2d Cir. 2000), and *State of Maine v. Department of Navy*, 973 F.2d 1007 (1st Cir. 1992). These cases recognize that the cost of reviewing permit applications, conducting investigation and inspections, reviewing reports, taking enforcement actions, and other regulatory activities constitute legitimate regulatory

---

[2] Thus, for example, the United States argues that California's fees are not "requirements" to control pollution, but instead are fees that are imposed in order to generate revenue for state programs. Opposition at 9. But the court had no evidence before it as to how much money California spends to regulate the Corps of Engineers' activities, and no basis whatever for any assumption that the fees assessed exceeded these regulatory costs. In addition, the United States argues that the propriety of the court's extra-record "finding" that California provides " . . . no services or benefits . . . whatsoever" to the Corps is a narrow question that this Court should not resolve. App. 25, Opposition at 8, 14-15. But this "finding" actually represents the Ninth Circuit's ruling that as a matter of law, California's fees are not "requirements" within the meaning of Clean Water Act sections 313(a) and 404(t), 33 U.S.C. § 1323(a) and 33 U.S.C. § 1344(t). Hence, the Ninth Circuit's rulings are sufficiently broad to present important questions of federal law that have not been, but should be, decided by this Court.

services for which reasonable fees may be charged. Petition at 28.

Moreover, the United States offers no real defense of the Ninth Circuit's misconstruction of this Court's decision in *Department of Energy v. Ohio*, 503 U.S. 607 (1992). In determining that California's waste discharge requirements fees are disguised punitive penalties, although they do not punish dischargers for past misconduct, the Ninth Circuit has decided an important federal question in a way that both misconstrues and conflicts with *Department of Energy v. Ohio*. Petition at 8-11. California has never sought civil penalties in this case. The State seeks to recover only reasonable service charges which all other dischargers must pay. Petition at 9, fn. 4. The amount of the fee is based on the volume of discharge and has nothing to do with punishment for past noncompliance. Petition at 5-6, 7.

Last, the United States defends the Ninth Circuit decision by erroneously applying the canon of interpretation that a specific statutory provision may control a more general provision, where the two provisions conflict. Opposition at 11-12. But here, the two provisions are not in conflict; they are complementary. Petition at 17-19. The plain language of the Clean Water Act reveals a coherent, unequivocal textual waiver of sovereign immunity for the fees at issue here, with section 313(a) emerging as the primary waiver, while section 404(t) is fundamentally a savings clause. The express intent of language employed in section 404(t) – "[n]othing in this section shall preclude or deny the right of any State . . . " is to prevent section 404 from being interpreted to override any rights saved to the States under any other provisions of law, including sections 303, 510 and 101(g) of the

Clean Water Act. Petition at 13-19. The Ninth Circuit's ruling would turn Congressional intent on its head, interpreting section 404 to prevent any State from asserting its authority under section 313 of the Clean Water Act. Moreover, Congress uses the term State "requirements" in the same context in both sections 404(t) and 313(a); there is no indication that Congress intended "requirements" to mean something different in section 404 than it does in section 313.[3]

In defending the Ninth Circuit's decision, the United States embraces a misconstruction of the applicable provisions of the Clean Water Act in a manner inconsistent with the terms of the statute itself. Indeed, the decision completely ignores two critical phrases in section 313(a): the phrase stating that "requirements" include "any requirement respecting permits and any other requirement, whatsoever . . . " and a later phrase which mandates the section's application "notwithstanding any immunity of [federal] agencies . . . under any law or rule of law." *See* Petition at 16. The decision misconstrues the Clean Water Act in holding that sections 313(a) and 404(t) do not waive federal sovereign immunity from the State's permit-related regulatory fees at issue here. The waiver contained in those sections is clear, unambiguous, and unequivocal. Federal dischargers, like other dischargers, are subject to California's "requirements," including "reasonable service charges." *See* Petition, 11-19.

---

[3] It is a maxim of statutory interpretation that "when the same words are used in different sections of the law, they will be given the same meaning." *Barnson v. United States*, 816 F.2d 549, 554 (10th Cir. 1987), *cert. denied*, 484 U.S. 896 (1987); *see also, Firestone v. Howerton*, 671 F.2d 317, 320 n.6 (9th Cir. 1982).

Accordingly, California urges this Court's review of the substantial questions presented in this case. The decision below conflicts with a decision of this Court, conflicts with decisions of the Second and First Circuit on the same important matter, and presents important questions of federal law that have not been, but should be, decided by this Court.

CONCLUSION

For the foregoing reasons, as well as those which have been urged in the Petition, certiorari should be granted.

Dated: December 14, 2001

Respectfully submitted,

BILL LOCKYER
Attorney General

RICHARD M. FRANK
Chief Assistant Attorney General

MARY HACKENBRACHT
Senior Assistant Attorney General

JOHN A. DAVIDSON
Supervising Deputy Attorney General

MICHAEL W. NEVILLE
Deputy Attorney General
Counsel of Record

Counsel for Petitioner State of California